IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 19, 2008

DONNELL V. BOOKER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2003-D-2866, 2003-D-2892 Cheryl Blackburn, Judge

No. M2007-01932-CCA-R3-PC - Filed August 13, 2008

The petitioner, Donnell V. Booker, was denied post-conviction relief by the Criminal Court for Davidson County from his 2005 convictions for attempted second degree murder and two counts of aggravated robbery, Class B felonies, and resulting effective sentence of twenty years. He appeals and contends that he received the ineffective assistance of trial counsel and that his guilty pleas were not knowingly and voluntarily entered. We affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Nathan Scott Moore, Nashville, Tennessee, for the appellant, Donnell V. Booker.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Victor S. Johnson, III, District Attorney General; and Robert Elliott McGuire, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In case number 2003-D-2866, the petitioner was indicted for attempted first degree murder and attempted aggravated robbery, and in case number 2003-D-2892, he was indicted for two counts of aggravated robbery. Pursuant to a plea agreement with the state, he pled guilty to attempted second degree murder and two counts of aggravated robbery. At the plea submission hearing, the state summarized the facts leading to the petitioner's convictions as follows:

> As to the State's proof in 2003-D-2892 on June 30th, 2003 and August the 9th of 2003, this defendant robbed Mr. Randall Carter at his tire store at 1156 Murfreesboro Pike here in Nashville, Davidson County. The robberies were essentially the same in the sense that Mr. Booker entered the store, held Mr. Carter at gunpoint, at which point

> he took money from Mr. Carter as well as weapons from Mr. Carter on both instances.
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> When he was arrested on . . . August the 13th . . . he had both the weapons that were stolen from Mr. Carter in the robberies on his person as well as some jewelry that Mr. Carter had reported stolen in the robberies. They were also on his person or in his residence.
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> . . . [A]s to case 2003-D-2866, the State's proof would be that on May 30th of 2003 the defendant shot Mr. David Driver. . . . [H]e had been in custody with Mr. Driver on a gambling charge on May the 22nd . . . . He was identified out of a photo lineup by Mr. Driver as the person who had shot him.

The petitioner received ten-year sentences for each offense, with the aggravated robbery sentences to be served consecutively to each other and concurrent with the sentence for the attempt conviction. The total twenty-year sentence was ordered to be served consecutively to a sentence the petitioner was serving on parole at the time of the offenses. The record reflects that as part of the petitioner's plea agreement, charges stemming from two other cases—including assault, resisting arrest, evading arrest, drug possession charges, tampering with evidence, possession of a weapon, and possession of a gambling device—were dropped.

At the post-conviction hearing, the petitioner testified that he had three attorneys working on his cases before he was represented by trial counsel, who represented him when he pled guilty. The petitioner said he saw trial counsel three times before he pled guilty. The petitioner said that he was incarcerated during this time and that trial counsel only wrote to him to tell him of an impending court date. He said that he told trial counsel he was not guilty but that counsel instructed him to plead guilty to avoid a federal prosecution. He said that he tried to discuss trial strategy with trial counsel but that trial counsel appeared uninterested in taking the case to trial, although counsel said he did not care whether the case went to trial. The petitioner said he believed counsel was not prepared for trial because the pleas were entered only a few days before the trial was scheduled to begin and they had not talked about the trial by that point. The petitioner said he "probably would have" been comfortable having a trial if his counsel had talked to him more about the case.

The petitioner testified that on the day he pled guilty, he told his trial counsel that he was not guilty and did not want to plead guilty but that counsel repeatedly told him he could face a federal prosecution, and a longer sentence, if he did not plead guilty. The petitioner said that at the time of the post-conviction hearing, he believed that the U.S. Attorney's office never intended to prosecute him because they never showed any interest in his case from the time the crimes were committed until July 2005, when he pled guilty. He said he decided to plead guilty based on trial counsel's advice that he would avoid federal prosecution by doing so. He said he believed that counsel gave him this advice to avoid a trial, not because it was in the petitioner's best interest. The petitioner

also testified that he had asked trial counsel to file pretrial motions, including a motion to suppress, but that counsel never did file any motions on his behalf.

On cross-examination, the petitioner testified that in his first meeting with his trial counsel, he talked about the case for about thirty minutes. He said that in their second meeting, he asked counsel to file a motion to suppress. He said their third meeting took place the day the petitioner pled guilty. The petitioner acknowledged that the plea hearing transcript reflects that he said he was satisfied with trial counsel's work, that counsel had done everything the petitioner asked him to do, and that he was pleading guilty because he was guilty. The petitioner said these statements were not truthful. He said he did not ask for another attorney because he did not have money to hire another one and did not know he could have one appointed for him. He said he did not tell the court that counsel had failed to file a motion to suppress on his behalf. The petitioner said he considered the threat of a federal prosecution in deciding to plead guilty. The petitioner said he believed his trial counsel did not want to represent him, as counsel continued to encourage him to plead guilty although he told counsel he was not guilty and where he was at the time of the robberies. He said he ultimately pled guilty because he believed he had no other choice.

The petitioner's trial counsel testified that he had eleven years of experience as a criminal defense attorney. He said he was hired in April 2005 to represent the petitioner, but he believed he met with the petitioner in jail sometime before that. He could not remember how many total times he met with the petitioner but thought three times was a good estimate. He said he did not remember the petitioner asking him to file a motion to suppress, although his file showed that he had planned on filing a motion in limine to suppress drugs that were found on the petitioner. He said he remembered an issue involving the suppression of a co-defendant's testimony, but he said there was no basis for the suppression.

Trial counsel testified that he represented the petitioner in four different cases and that the petitioner had said he wanted to go to trial on all the cases. Regarding his robbery case, counsel said he discussed the evidence and different trial issues with the petitioner. He said the case file reflected that he prepared the case for trial. He said he was prepared to go to trial on the date the cases were set for trial. He said he left the choice of whether to go to trial up to his clients and did not pressure them about going to trial or not going to trial. He said three primary issues influenced the petitioner's decision to plead guilty. First, because the petitioner was on parole at the time of the offenses, counsel believed the petitioner would receive consecutive sentences and that, if convicted as charged in all his cases, the petitioner could face a sentence of over eighty years. Second, the assistant district attorney prosecuting the case informed counsel that the U.S. Attorney's office was considering prosecuting the petitioner and that a recommendation that the case not be federally prosecuted could be made part of the plea agreement. However, counsel testified that this issue was "not as major an issue as [the petitioner was] discussing" at the post-conviction hearing. He said the final, and most significant, issue was that the petitioner wanted a guarantee that his cousin, Corey, would be "cut loose" from the case. Regarding the issue of federal prosecution, counsel testified that it was his understanding that if the petitioner pled guilty, the state would recommend that the

petitioner not be prosecuted in federal court but that if the petitioner were acquitted of the charges in state court, he could face a federal prosecution.

On cross-examination, trial counsel testified that he did not talk to anyone in the U.S. Attorney's office to confirm their interest in the petitioner's case but that he relied upon the representations of the assistant district attorney. He said he asked the prosecutor to state on the record, during the plea colloquy, that he would recommend that the U.S. Attorney's office not prosecute the petitioner. Counsel said an investigator had been hired to investigate the petitioner's cases before counsel began representing the petitioner. Reports and evidence gathered by the investigator, including videos, were included in the petitioner's file. Counsel acknowledged that he did not show the videotapes to the petitioner. He said he thought the petitioner had reviewed the discovery in the case before counsel was retained.

Trial counsel testified that the petitioner was identified by a witness through a photographic lineup. He said he did not know any basis for suppressing the identification. Counsel acknowledged that he did not talk to any witnesses himself but relied on the discovery contained in the petitioner's file and the work done on the case before he was retained. He said that on the day of the plea hearing, the petitioner initially said he wanted to go to trial and that he was preparing the case for trial. However, he said that after they got the state's final offer, which included releasing Corey from prosecution and the state's recommendation against federal prosecution, the petitioner changed his mind. Counsel said that the petitioner was hesitant about pleading guilty but that the petitioner knew what he was doing and why he was doing it.

The trial court denied the petitioner post-conviction relief. It found the testimony of trial counsel to be credible and determined that trial counsel was not ineffective. It further found that the petitioner "was aware of the plea process and its ramification and that he knowingly and voluntarily entered his plea." The petitioner now appeals the trial court's denial and contends that his trial counsel was ineffective and that his pleas were not entered knowingly and voluntarily. He argues that counsel was ineffective in failing to consult with the petitioner and advise him of the plea's consequences, in failing to investigate the facts of the petitioner's cases adequately, and in inducing the petitioner to plead guilty. The state contends that the facts and law support the trial court's denial of relief.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72,113 S. Ct. 838, 842-44, 122 L. Ed. 2d 180 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to a general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. When a petitioner claims that the ineffective assistance of counsel resulted in a guilty plea, the petitioner must prove prejudice by showing that but for counsel's errors, the petitioner would not have entered the plea and would have insisted upon going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985). Failure to satisfy either the deficiency or prejudice prong results in the denial of relief. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The petitioner has not established that his trial counsel acted deficiently or that he was prejudiced by the actions of counsel. The petitioner complains that counsel failed to consult with him adequately and to advise him of his pleas' consequences. He argues that counsel was ineffective in advising the petitioner that he could avoid federal prosecution by pleading guilty without properly investigating whether federal authorities were interested in prosecuting the petitioner. Trial counsel, whose testimony the trial court accredited, testified that he relied on the representations of the assistant district attorney in this regard, and the plea hearing transcript reflects that the assistant district attorney agreed to recommend against federal prosecution. The petitioner asserts that because federal authorities never investigated his case, they never intended to. This, however, is not clear and convincing evidence that the representations of the assistant district attorney were false or that trial counsel was deficient in relying on those representations. The petitioner also argues that the number of times trial counsel met with him—three times—is indicative of ineffective assistance. He has not, however, explained how further consultation with his trial counsel would have affected his decision to plead guilty.

The petitioner argues that trial counsel was ineffective in failing to investigate the facts of the case adequately. Again, the petitioner has not specified how greater investigation on the part of trial counsel would have affected his decision to plead guilty. We cannot speculate as to what evidence further investigation would have yielded. See Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1999). Moreover, contrary to the testimony of the petitioner, trial counsel testified that he was prepared to represent the petitioner at trial. The evidence supports the trial court's finding that counsel did not represent the petitioner deficiently.

The petitioner finally argues that his guilty pleas were not knowing and voluntary because trial counsel induced him to plead guilty by threatening him with federal prosecution. When

evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. See State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). The circumstances include

> the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citing Caudill v. Jago, 747 F.2d 1046, 1052 (6th Cir. 1984)). A plea resulting from ignorance, misunderstanding, coercion, inducement, or threats is not "voluntary." Id.

The record supports the trial court's finding that the petitioner entered his pleas knowingly and voluntarily. Trial counsel testified that the threat of federal prosecution was one of several factors the petitioner considered before deciding to plead guilty. In addition to this, the petitioner was concerned with minimizing his sentence by avoiding a conviction on all charges and in ensuring that his cousin would not be prosecuted. As a result of the petitioner's pleas, several charges against the petitioner were dismissed. As the trial court pointed out in its order, the petitioner's statements during the plea colloquy indicated that he was entering the plea knowingly and voluntarily. The petitioner's claim to the contrary is without merit, and the petitioner is not entitled to relief.

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court denying post-conviction relief.

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JOSEPH M. TIPTON, PRESIDING JUDGE